



Billing Code: 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 181019964-9283-01]

RIN 0648-XG584

Announcement of Hearing Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of hearing.

SUMMARY: This notice announces an agency hearing to be convened by the National Marine Fisheries Service before an administrative law judge (ALJ) and the process by which interested persons can participate in the hearing. The hearing involves a proposed waiver under the Marine Mammal Protection Act (MMPA) and proposed regulations governing the hunting of eastern North Pacific (ENP) gray whales by the Makah Indian Tribe in northwest Washington State. A proposed rule relating to the proposed waiver and regulations is published elsewhere in today's issue of the *Federal Register*.

DATES: NMFS has scheduled a hearing before Administrative Law Judge George J. Jordan to consider the proposed MMPA waiver and the proposed regulations. It will begin on August 12, 2019 at 9:30 a.m. PDT in the Henry M. Jackson Federal Building, 915 Second Ave., 4th Floor Auditorium, Seattle, WA, 98174. A pre-hearing conference is scheduled on June 17, 2019, at 10:00 a.m. PDT in the Henry M. Jackson Federal Building, 915 Second Ave., Seattle, WA, 98174 (room location to be set by the ALJ). Persons interested in participating as a party in

the hearing should consult regulations at 50 CFR part 228 and this notice and notify NMFS by the filing deadline below.

Filing deadlines: Any person desiring to participate as a party at the hearing must notify the NMFS West Coast Region Regional Administrator, by certified mail, postmarked on or before May 6, 2019. Any person desiring to participate as a party must submit initial written direct testimony by May 20, 2019, as specified below. All notices, testimony, and other filings must include the following Hearing Docket Number assigned to this matter: 19-NMFS-0001.

Interested persons should consult the remainder of this notice and the procedural regulations at 50 CFR part 228 for additional deadlines, hearing procedures, and other opportunities for participation in the process.

ADDRESSES: Any person desiring to participate as a party in the hearing must notify NMFS, by certified mail, at the following address:

Mr. Barry Thom

Regional Administrator

NMFS, West Coast Region

1201 NE Lloyd Boulevard, Suite 1100

Portland, OR 97232

Any person desiring to participate as a party in the hearing should also send an electronic copy to *aljseattle@uscg.mil*.

All documents pertaining to the hearing, including initial direct testimony, shall be filed with the ALJ. All documents should, to the extent possible, be formatted in a way that makes them accessible to individuals with disabilities or otherwise compliant with the Section 508 Amendment of the Rehabilitation Act of 1973, 29 U.S.C. 794d. More information on creating

accessible documents may be found at <https://www.section508.gov/create>. Parties are encouraged to submit direct testimony and other documents via email to the ALJ at aljseattle@uscg.mil (noting the Hearing Docket Number assigned to this matter: 19-NMFS-0001). If the size of the attachment exceeds email capacity, parties are then encouraged to mail a CD-ROM with the document included to the ALJ (at the address listed below). If a party is unable to file electronic documents, parties shall file paper hardcopies of the documents with the ALJ (at the address listed below). Only a single copy of any filing is required, whether filed electronically or hardcopy. The mailing address for any CD-ROM or paper hardcopy is:

ALJ Docketing Center

U.S. Custom House

Attn: Hearing Docket Clerk

40 S. Gay Street, Room 412

Baltimore, MD 21202

All filings associated with the hearing become part of the record, which will be available for public viewing and inspection at the ALJ's hearing website:

<https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal-Rulemaking-Makah-Tribe/>. These filings will include the initial direct testimony of NMFS in support of the proposed regulations and waiver and, upon issuance, the ALJ's preliminary determination of the issues of fact that may be addressed at the hearing.

Information pertaining to this hearing is also available at the NMFS West Coast Region website:

<https://www.fisheries.noaa.gov/action/formal-rulemaking-proposed-mmpa-waiver-and-hunt-regulations-governing-gray-whale-hunts-makah>.

NMFS prepared a draft environmental impact statement (DEIS) (80 FR 13373; March 13, 2015) for the proposed waiver and regulations. The DEIS and comments thereon may be accessed at the Federal eRulemaking Portal <http://www.regulations.gov> via the following Docket Identification: NOAA-NMFS-2012-0104. The DEIS and comments, along with any communications falling under 50 CFR 228.10(b) (ex parte communications), also are available for viewing at the address for the Regional Administrator listed above.

FOR FURTHER INFORMATION CONTACT: Michael Milstein, NMFS West Coast Region, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232-1274; 503-231-6268.

SUPPLEMENTARY INFORMATION:

On February 14, 2005, NMFS received a request from the Makah Indian Tribe for a waiver of the MMPA moratorium on the take of marine mammals to allow for take of ENP gray whales (*Eschrichtius robustus*). The Tribe requested that NMFS authorize a tribal hunt for ENP gray whales in the coastal portion of the Tribe's usual and accustomed fishing area for ceremonial and subsistence purposes and the making and sale of handicrafts. The MMPA imposes a general moratorium on the taking of marine mammals but authorizes the Secretary of Commerce to waive the moratorium and issue regulations governing the take if certain statutory criteria are met. After full evaluation of the Tribe's request, NMFS is proposing to authorize a limited tribal hunt for ENP gray whales and the making and sale of handicrafts. Additional information regarding the Tribe's request and NMFS' proposed waiver and regulations is provided in the associated proposed rule published elsewhere in today's issue of the *Federal Register*.

Under the MMPA, a decision to waive the take moratorium and issue regulations governing the take must be made on the record after an opportunity for an agency hearing on the

proposed waiver and regulations (16 U.S.C. 1373(d)). The hearing is governed by agency regulations at 50 CFR part 228, which call for the appointment of a presiding officer and prescribe other procedures. At the conclusion of the hearing process, the presiding officer will make a recommended decision based on the hearing record and transmit the decision and record to the NOAA Assistant Administrator for Fisheries.

Pursuant to the regulations, this notice of hearing shall include the following information:

1. The nature of the hearing. The subject of the hearing is NMFS' proposal to issue a waiver and regulations under the MMPA (16 U.S.C. 1371(a)(3)(A) and 1373) regarding the take of ENP gray whales and the making and sale of handicrafts by the Makah Indian Tribe. NMFS' proposed waiver and regulations are published elsewhere in today's *Federal Register*. The hearing is governed by the requirements of the Administrative Procedure Act (5 U.S.C. 553, 555-557) and agency regulations at 50 CFR part 228. In particular, interested persons should be aware of the restrictions on communications that apply to the hearing process set forth in 5 U.S.C. 557(d)(1) and 50 CFR 228.10. These and additional restrictions on communications are described in a NOAA memorandum entitled "Restrictions on Communications Pertaining to Makah Indian Tribe's Request for Waiver of Moratorium on Take of Eastern North Pacific Gray Whales," available on the NMFS West Coast Region website (see **ADDRESSES**).

2. The place and date of the hearing. See **DATES** above.

3. The legal authority under which the hearing is to be held. 16 U.S.C. 1371(a)(3)(A) and 1373; 50 CFR part 228.

4. The proposed regulations and waiver and a summary of the statements required by 16 U.S.C. 1373(d). This information is provided in the proposed rule, published elsewhere in today's issue of the *Federal Register*.

5. Issues of fact that may be involved in the hearing. See below.
6. The date of publication of a draft environmental impact statement associated with the proposed waiver and regulations and the place where the draft and comments thereon may be viewed and copied (see **ADDRESSES**).
7. Any written advice received from the Marine Mammal Commission. A summary of the recommendations provided by the Marine Mammal Commission on the proposed waiver and regulations is provided in the proposed rule published elsewhere in today's *Federal Register*. Complete copies of the Commission's written advice are available on the NMFS West Coast Region website (see **ADDRESSES**).
8. The place where records and submitted direct testimony will be kept for public inspection. All filings and submitted direct testimony forming the record for this hearing will be available at ALJ's hearing website (see **ADDRESSES**). Documents pertaining to this hearing are available for public inspection at the address for the Regional Administrator (see **ADDRESSES**). Persons interested in reviewing these documents may contact the Regional Administrator (see **ADDRESSES**) to schedule a time to inspect them.
9. The final date for filing notice of intent to participate in the hearing. See filing deadlines under the **DATES** section above.
10. The final date for submission of direct testimony on the proposed regulations and waiver and the number of copies required. Direct testimony should be submitted as specified under **ADDRESSES** by the date specified under filing deadlines (see **DATES**).
11. The docket number assigned to the case. 19-NMFS-0001.
12. The date and place of the pre-hearing conference. See **DATES** above.

Issues of Fact That May Be Involved in the Hearing

Based on the best available scientific evidence related to the applicable MMPA criteria, NMFS has determined that the following facts support issuance of the proposed waiver and regulations, described in the proposed rule published elsewhere in today's issue of the *Federal Register*.

I. WAIVER

A. NMFS gave due regard to the potential effects of the proposed waiver on the distribution, abundance, breeding habits, and times and lines of migratory movements of the ENP gray whale stock.

1. The proposed waiver will not have a meaningful effect on the distribution, abundance, breeding habits, or migratory movements of the ENP gray whale stock.

2. NMFS recognizes two stocks of gray whales under the MMPA, the western North Pacific (WNP) stock and the eastern North Pacific (ENP) stock.

3. Under the MMPA, NMFS defines the Pacific Coast Feeding Group (PCFG) as gray whales observed between June 1 and November 30 within the region between northern California and northern Vancouver Island (from 41°N. lat. to 52°N. lat.) and photo-identified within this area during two or more years. The PCFG is part of the ENP stock.

4. The ENP stock ranges from the winter/spring breeding grounds in northern Mexico and southern California to the summer/fall feeding grounds in the Bering, Beaufort, and Chukchi seas. The ENP stock migrates between the breeding and feeding grounds between December and May. The PCFG spends the summer and fall feeding season off the Pacific coast of North America from northern California to northern Vancouver Island.

5. The best available abundance estimate for the ENP stock is 26,960.

6. The best available abundance estimate for the PCFG is 243.
7. The proposed waiver, at a maximum, would result in the deaths of 25 whales over 10 years, or an average of 2.5 per year. The proposed waiver, at a maximum, would reduce the ENP gray whale stock by 0.09 percent over 10 years, or an average of 0.009 percent per year.
8. Reducing the ENP stock by 0.009 percent per year or 0.09 percent over 10 years would not have a discernable effect on the ENP stock's abundance.
9. The United States is a signatory to the International Convention for the Regulation of Whaling (ICRW). The ICRW establishes the International Whaling Commission (IWC), which, among other things, establishes catch limits for aboriginal subsistence whaling by member states.
10. Since 1997, the IWC has routinely approved an aboriginal subsistence catch limit for ENP gray whales for joint use by the United States and the Russian Federation. The United States and the Russian Federation have been routinely, and currently are, parties to a bilateral agreement that allocates the IWC catch limit between the two countries and allows either country to transfer to the other any unused allocation.
11. The United States has routinely transferred its unused share of the IWC catch limit to the Russian Federation for use by Chukotkan hunters.
12. Based on long-standing practice and the current United States-Russian Federation bilateral agreement, the United States would likely continue to transfer any unused IWC catch limit to the Russian Federation for use by Chukotkan natives, so that the net effect of the hunt on ENP gray whale abundance would be the same with or without the proposed waiver.

13. The proposed waiver, at a maximum, would result in a total of 150 unsuccessful strike attempts and training harpoon throws, combined, over 10 years, or an average of 15 per year.

14. The proposed waiver, at a maximum, would result in a total of 353 approaches (causing a hunt or training vessel to be within 100 yards of a gray whale) per year, with a sub-limit of 142 approaches of PCFG whales.

15. The ENP stock has demonstrated resiliency to decades of active hunting by Chukotkan natives and other human activities. Gray whales were classified as an endangered species under U.S. law in 1970 (the original listing included both ENP and WNP gray whales). Subsequently, the ENP stock recovered and was de-listed in 1994. The ENP stock grew from 12,771 animals to approximately 27,000 animals between 1970 and 2016.

16. Despite over a hundred gray whales being pursued and killed in aboriginal subsistence hunts off Chukotka each year, many of which are killed during the summer feeding months, there has not been a discernible change in the availability or location of gray whales in the Chukotkan hunt area.

17. Unsuccessful strike attempts and training harpoon throws are expected to result in temporary disturbance but not to have a lasting effect on the affected whale's health or behaviors.

18. Approaches are not expected to have a lasting effect on the affected whale's health or behaviors.

19. Photo-identification is a reliable, feasible method of identifying PCFG and WNP whales.

20. The proposed waiver, at a maximum, would result in 16 strikes of PCFG whales over the 10-year duration of the waiver period (average of 1.6 per year), of which only 8 strikes would be of PCFG females (average of 0.8 per year).

21. Under the proposed waiver, NMFS would manage impacts of the proposed waiver to PCFG whales through photo-identification and specified assumptions.

22. The proposed waiver would require that hunting cease if PCFG abundance were to fall below set levels. The levels, referred to as low-abundance triggers, are 192 whales, or a minimum abundance estimate of 171 whales.

23. NMFS would use a forecasting model to provide up-to-date PCFG abundance estimates during the waiver period.

24. PCFG abundance has been stable or increasing since around 2002, with an average annual increase in abundance of 3.5 animals between 2002 and 2015.

25. The combination of strike limits and low-abundance triggers will ensure that the proposed waiver will not cause PCFG abundance to decline below recent stable levels.

26. Because the proposed waiver will not cause PCFG abundance to decline below recent stable levels, the proposed waiver is not expected to affect the range-wide distribution of the ENP stock, including the stock's distribution within the PCFG range.

27. Under the proposed waiver, hunting or hunt training is most likely to overlap with gray whale breeding in December-January. NMFS expects that few if any hunt activities would occur in December-January due to inclement weather and unfavorable ocean conditions, but it is possible that hunt activities could occur in December-January and could encounter mating whales.

28. The proposed waiver would not adversely affect ENP gray whale breeding, because the proportion of the migration corridor where hunt activities could occur is small, the level of hunt activity likely to occur in December-January is low, the number of whales that could be struck is extremely small, and any whales that were disturbed would likely have repeated opportunities to mate throughout the remainder of the southward migration.

29. Migrating ENP gray whales are only expected to be encountered during even-year hunts. Migrating whales are steady swimmers that would transit the hunt area within several hours. The hunt area is a very small portion of the ENP gray whale stock's migration corridor.

30. During even-year hunts, adverse weather and ocean conditions coupled with shorter periods of daylight would keep most hunts and training exercises close to shore and of short duration.

31. A very small number of migrating ENP gray whales would be subjected to hunt or training activities. Any gray whale subject to such activities (but not struck) would likely experience the encounter as a temporary and localized near-shore event that would not result in a lasting effect on the whale's migratory movements.

B. NMFS properly concluded that the proposed waiver is in accord with the MMPA's purposes and policies because it will not affect the health, stability, or functioning of the marine ecosystem or the ENP stock's abundance relative to its optimum sustainable population (OSP) levels.

1. The proposed waiver is not expected to have a meaningful effect on the health, stability, or functioning of the marine ecosystem or on the ENP stock's abundance relative to OSP.

2. The level of hunting that could occur under the proposed waiver would affect only a small fraction of the ENP stock and the stock's ecosystems. Most effects of the hunt would be temporary and localized.

3. The ENP stock functions within many large ecosystems shaped by a variety of processes. The smallest recognized ecosystem that encompasses the hunt area is the northern California Current ecosystem.

4. The northern California Current ecosystem is shaped by dynamic, highly energetic, large-scale processes, including currents, upwelling, freshwater runoff, seasonal wind/storm patterns, and variable climate patterns such as El Niño. The role of ENP gray whales in structuring this ecosystem is limited.

5. The number of removals of gray whales that could occur under the proposed waiver is too small to have a discernable effect on the northern California Current ecosystem.

6. Even at the smallest biologically relevant scale, the northern Washington coastal environment, the level of hunting that could occur under the proposed waiver would not have a perceptible effect on the health or stability of the marine ecosystem or the functioning of the ENP stock within the ecosystem.

7. The ENP stock has been within OSP levels since at least 1995. In 2012, NMFS concluded that the ENP stock was at 85 percent of carrying capacity with an 88 percent likelihood that the stock was above its maximum net productivity level. NMFS's current stock assessment report for the ENP stock continues to adopt this conclusion.

8. The removal of up to 25 whales from the ENP stock over 10 years, or 2.5 whales average per year, is not expected to affect the ENP stock's abundance relative to its OSP levels.

II. REGULATIONS

A. The proposed regulations are necessary and appropriate to ensure that a tribal hunt will not disadvantage the ENP gray whale stock, because the proposed regulations will have no discernable effect on the ENP gray whale stock's abundance relative to OSP. *See* Issues of Fact I.A.7-8, I.B.7-8.

B. The proposed regulations are necessary and appropriate to ensure that a tribal hunt will be consistent with the purposes and policies of the MMPA. *See* Issues of Fact I.B.1-8.

C. NMFS gave full consideration to all relevant factors in prescribing the proposed regulations, including existing and future levels of marine mammals stocks, existing international treaty and agreement obligations of the United States, the marine ecosystem and related environmental considerations, the conservation, development, and utilization of fishery resources, the economic and technological feasibility of implementation, and potential effects to the WNP stock.

1. NMFS fully considered the effects of the proposed regulations on the existing and future levels of the ENP gray whale stock. *See* Issues of Fact I.A.7-8, I.B.7-8.

2. NMFS fully considered the effects of the proposed regulations on existing international treaty and agreement obligations of the United States.

3. Under the ICRW and through the bilateral agreement between the United States and the Russian Federation, the Makah Tribe can harvest up to five ENP gray whales per year.

4. The proposed regulations would not authorize the Tribe to harvest more ENP gray whales than available under the ICRW and the U.S.-Russian Federation bilateral agreement.

5. The IWC Scientific Committee's Standing Work Group on Aboriginal Subsistence Whaling Management Procedures evaluated a Makah tribal hunt as would be carried out under the proposed regulations and determined that the hunt would meet the IWC conservation objectives for ENP, WNP, and PCFG whales.

6. NMFS fully considered the effects of the proposed regulations on the marine ecosystem. See Issues of Fact II.A.2.a-f. *See* Issues of Fact I.B.1-6.

7. NMFS fully considered the effects of the proposed regulations on environmental considerations related to the marine ecosystem, including potential effects to water quality, pelagic and benthic habitats, other species of fish and wildlife, and marine noise levels.

8. The proposed regulations would have no effect on the conservation, development, or utilization of fishery resources.

9. NMFS fully considered the economic and technological feasibility of implementation of the proposed regulations.

10. NMFS's costs associated with the proposed regulations would primarily involve the continuation of longstanding gray whale surveys and photo-identification work, with additional funding of approximately \$2,000 per day of hunting needed to support NMFS monitoring and enforcement personnel. The annual NMFS budget for marine mammal management in the West Coast Region is over \$700,000.

11. The costs to NMFS associated with regulating a hunt under the proposed regulations are feasible.

12. The Tribe's 1999 gray whale hunt successfully demonstrated the economic and technological feasibility of the Tribe prosecuting a gray whale hunt. The Tribe has enacted a detailed Tribal Whaling Ordinance, which demonstrates the feasibility of tribal hunt management.

13. The proposed regulations include provisions for matching photographs of struck whales to those of known whales, a procedure which is technologically feasible.

14. The proposed regulations include provisions for marking and tracking handicrafts made from non-edible whale products, which is technologically feasible.

15. NMFS determined that potential risks to WNP gray whales from implementation of the proposed regulations is an additional relevant factor in prescribing the regulations and fully considered such risks.

16. The proposed regulations contain a number of restrictions to limit the risk of death, injury, or other harm to WNP whales. These include alternating hunt seasons, a limit of three strikes during even-year hunts, a ban on hunting during November and June, seasonal restriction on training harpoon throws in odd-numbered years, restriction on multiple strikes within 24 hours during even-year hunts, and the requirement that if a WNP is confirmed to be struck, the hunt will cease until steps are taken to ensure such an event will not recur.

17. NMFS's scientists undertook a risk analysis to quantify risk to WNP whales based on the best scientific evidence available and using conservative assumptions.

18. NMFS's risk analysis concludes that there is a 5.8 percent probability of hunters striking one WNP gray whale over the 10 years of the regulations, meaning over the course of seventeen 10-year hunt periods, one WNP gray whale would be expected to be struck (*i.e.*, in one year out of 170), if the Tribe made the maximum number of strikes attempts allowed in even-year hunts and if ENP and WNP population sizes and migration patterns remained constant.

19. NMFS's risk analysis concludes that there is about a 30 percent probability that one WNP whale would be subjected to an unsuccessful strike attempt or training harpoon throw over the 10 years of the regulations, or one such encounter every 33 years, if the Tribe made the maximum number of strike attempts allowed in even-year hunts and if ENP and WNP population sizes and migration patterns remained constant.

20. Unsuccessful strike attempts and training harpoon throws are expected to result in temporary disturbance but not to have a lasting effect on the affected whale's health or behaviors.

21. NMFS's risk analysis concludes that a maximum of 14 WNP gray whales could be approached within 100 yards over the ten years of the waiver period, or an average of 1.4 per year, if ENP and WNP population sizes and migration patterns remain constant. This analysis assumes that all allowed approaches (3,530 over 10 years) are made and all occur between December 1 and May 31, meaning that no hunting would occur during odd-year hunts.

22. Approximately twice as many suitable days for hunting and training occur during the months of odd-year hunt seasons than during the months of even-year hunt seasons, considering weather conditions and whale availability.

23. If the Tribe made the full number of approaches allowed under the proposed regulations each year of the waiver period, and those approaches were divided evenly between odd-year and even-year hunts, then approximately 0.7 WNP whales would be subjected to an approach annually.

24. Approaches are not expected to have a lasting effect on the whale's health or behaviors.

Authority: 16 U.S.C. 1371(a)(3)(A) and 1373; 50 CFR part 228.

Dated: March 27, 2019.

Barry A. Thom,

Regional Administrator, West Coast Region,

National Marine Fisheries Service.

[FR Doc. 2019-06336 Filed: 4/4/2019 8:45 am; Publication Date: 4/5/2019]